

the Poultry Integrator Defendants' motion is yet another in a long string of efforts not only to delay the State's case, but also to metamorphose the State's case into the case they wish the State had brought rather than the case the State has in fact brought. The State is the master of its Complaint and claims, and should be allowed to proceed expeditiously with its case. To this end, the State urges that a scheduling conference be held at the Court's very earliest convenience.

II. BACKGROUND

On June 13, 2005, the State filed its Complaint against the Poultry Integrator Defendants, seeking to hold the Poultry Integrator Defendants accountable for their past and continuing improper management and disposal of poultry waste within Arkansas and Oklahoma — conduct that has caused pollution of the Oklahoma portion of the Illinois River Watershed ("IRW").² The State withheld service of the Complaint in order to continue its attempts to achieve a negotiated resolution with the Poultry Integrator Defendants. These negotiations proved unsuccessful, and on August 19, 2005, the State filed its First Amended Complaint, and shortly thereafter effected service on the Poultry Integrator Defendants.

On October 3, 2005, the Poultry Integrator Defendants filed answers and approximately a half-dozen motions to dismiss. These motions are now fully briefed and ripe for resolution.

On October 4, 2005, the Poultry Integrator Defendants filed third-party complaints against more than 100 entities that live, own land or conduct business in the Oklahoma portion of the IRW.³ The third-party complaints seek indemnification and contribution from the third-party

² In their motion, the Poultry Integrator Defendants characterize the State's allegations as being "that the alleged natural resource damages stemmed, at least in part, from common and naturally occurring nutrients" Poultry Integrator Defendants' Motion, p. 5. This is a mischaracterization and is misleading, *see* State's FAC, and in any event is irrelevant to the issue at hand.

³ The Poultry Integrator Defendants assert that "the case initiated by the Plaintiffs involves complex factual and legal issues potentially encompassing natural forces and the operations of a multiple of persons, entities and industries spanning the entirety of the Illinois River Watershed." Poultry Integrator Defendants' Motion, p. 5 (emphasis added). This assertion is incorrect; the case initiated by the State involves the Poultry Integrator

defendants based on alleged activities in the Oklahoma portion of the IRW, such as owning a septic system, that are wholly unrelated to the improper actions of the Poultry Integrator Defendants that are at issue in this case.

On November 3, 2005, the State of Arkansas filed a petition with the United States Supreme Court seeking to invoke that Court's original jurisdiction in order to sue the State of Oklahoma. On the basis of the State of Arkansas's Supreme Court filing, on November 14, 2005, the Poultry Integrator Defendants sought to stay the proceedings in this case. Also on this basis, on December 23, 2005, the Poultry Integrator Defendants sought to toll the running of the time to serve their third-party complaints on the third-party defendants. On January 9, 2006, the Court granted this motion. On February 21, 2006, the United States Supreme Court denied the State of Arkansas's petition.

On February 24, 2006, the Poultry Integrator Defendants sought an extension of time to serve the third-party complaints on the third-party defendants. On March 21, 2006, the Court granted this motion, giving the Poultry Integrator Defendants until May 20, 2006, to effect service.

On April 5, 2006, the State filed a motion requesting the Court to sever and stay and / or strike or dismiss the third-party complaints.

On April 13, 2006, pursuant to the Court's March 24, 2006 order, the parties filed a Joint Status Report. In the Joint Status Report, the Poultry Integrator Defendants requested "that once the Third-Party Defendants have answered the Court hold a scheduling conference and enter a Case Management Order addressing the needs of the parties and to provide for orderly administration of the case." In contrast, the State requested "a scheduling conference at the Court's earliest convenience."

III. ARGUMENT

The Poultry Integrator Defendants' request to delay the scheduling conference (and hence the issuance of a scheduling order) until after June 30, 2006, is, in the State's view, simply another attempt to delay the progress of this lawsuit and should not be granted. Indeed, Fed. R. Civ. P. 16(b) makes clear that the scheduling order "shall issue as soon as practicable." (Emphasis added.)

Despite the plain language of the Rule, however, the Poultry Integrator Defendants maintain that the scheduling conference should be postponed until all of the third-party defendants have answered. *See* Poultry Integrator Defendants' Motion, p. 4. The Rule, however, does not support this position. Rather, it ties the timing of the issuance of a scheduling order to the appearance of "a defendant" or the service of the complaint on "a defendant." *See* Fed. R. Civ. P. 16(b). Significantly, in this case, all of the first-party defendants have been served and have answered. The case-in-chief is thus ready to, and needs to, proceed. Given that the injury to the State is continuing, it needs to proceed expeditiously.

Further, that not all of the third-party defendants have yet answered is of no moment. First, as explained in the State's April 5, 2006 motion requesting the Court to sever and stay and / or strike or dismiss the third-party complaints, the claims asserted by the Poultry Integrator Defendants in their third-party complaints are of dubious merit. Depending on how this motion is resolved, it is possible that the third-party complaints may be stricken or dismissed. Thus, the need for answers may well be mooted. Second, the third-party claims are for indemnity and contribution. To the extent these third-party claims even are legally or factually viable -- and the State disputes that they are -- they are contingent in nature, and thus should be tried only at the conclusion of the State's lawsuit. *See* State's April 5, 2006 Motion to Sever and Stay and / or

Strike or Dismiss. Thus, the third-party defendants would be proceeding on an entirely different schedule than the State.

Likewise, the existence of a case management order is not a prerequisite to a scheduling conference. The State has already reached out to the Poultry Integrator Defendants on various case management related issues -- e.g., the State has provided a proposed confidentiality order to the Poultry Integrator Defendants; the State has also discussed bates numbering protocols with the Poultry Integrator Defendants. The State stands ready and willing to work cooperatively with the Poultry Integrator Defendants on addressing case management issues, as set forth in the Joint Status Report and as discussed at the Rule 26(f) conference.⁴ To the extent that agreement can be reached on issues, the parties may bring these to the Court for incorporation into a case management order.⁵ To the extent that there are disputes on the issues, the parties can bring these to the Court for resolution, and in the meanwhile, default to the tried and true Federal Rules of Civil Procedure. The absence of a case management order, however, is not an impediment to the entry of a scheduling order, and should not be seen as such. Indeed, the requirement that there be a case management order in place prior to a scheduling conference only serves to delay the holding of a scheduling conference.

Simply put, the State's case has been delayed long enough. There has been the Poultry Integrator Defendants' motion to stay in connection with the State of Arkansas's ill-founded petition before the United States Supreme Court. There has also been the Poultry Integrator Defendants' motions to toll and then extend the service deadlines for their third-party complaints. And now there is this motion. Attempts to tie a scheduling conference for the State's case to the

⁴ The State is thus at a loss to understand why the Poultry Integrator Defendants see the need for a Court order directing the parties to meet and confer for the purpose of establishing a case management order.

⁵ Hopefully, many case management issues can be resolved prior to a scheduling conference. But the one should not be tied to the other.

third-party complaints or the establishment of a case management order is, however, entirely unwarranted.

IV. CONCLUSION

WHEREFORE, premises considered, the State respectfully requests that this Court deny "Defendant / Third Party Plaintiffs' Motion for Miscellaneous Relief -- Request for Establishment of Procedure for Entry of Case Management Order." The time is presently ripe for a scheduling conference and scheduling order, and the State urges that a scheduling conference be held at the Court's very earliest convenience.

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